U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN L. PASCUCCI and DEPARTMENT OF JUSTICE,
U.S. MARSHALS SERVICE, Arlington, VA

Docket No. 03-922; Submitted on the Record;
Issued June 20, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he is entitled to compensation for a loss of wage-earning capacity due to his accepted employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing as untimely under 5 U.S.C. § 8124.

On October 26, 1993 appellant, then a 45-year-old former deputy United States Marshall, filed an occupational disease claim alleging that he sustained bilateral carpal tunnel syndrome, which he attributed to factors of his federal employment. Appellant worked as a U.S. Marshall from May 14, 1979 to November 16, 1990, when he was removed due to criminal conduct. Appellant was incarcerated from May 1990 to December 1992.

By decision dated April 29, 1994, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish fact of injury. In a decision dated December 12, 1994, a hearing representative vacated the Office's April 29, 1994 decision and instructed the Office to obtain additional medical records. In a decision dated April 26, 1995, the Office again denied appellant's claim. A hearing representative, in a March 11, 1996 decision, accepted appellant's claim for bilateral carpal tunnel syndrome and noted that the record required additional medical evidence to determine the degree and duration of any disability.

Appellant received schedule awards for a 22 percent permanent impairment of his right and left upper extremities. The period of the awards ran for 68.64 weeks, from September 22, 1997 to January 15, 1999. Following the expiration of schedule award payments, the Office informed appellant that he should submit rationalized medical evidence supporting disability in order to claim wage-loss compensation.[1]

[1] By letter dated December 6, 1999, a private employer indicated that as of January 2000 appellant had worked for the company for seven years and that his current position was that of a truck driver.

Appellant submitted a report dated December 9, 1999 from Dr. Brantley P. Vitek, Jr., a Board-certified orthopedic surgeon, who diagnosed bilateral carpal tunnel syndrome. Dr. Vitek indicated that appellant's physical restrictions were the same as those designated in 1997 by Dr. Katherine L. Maurath, a Board-certified physiatrist and his prior attending physician.[2]

In a memorandum of conference dated September 5, 2000, an official with the employing establishment indicated that, at the time of his employment injury, appellant did not use a computer or typewriter at work, handcuff individuals or undergo physical fitness examinations. The official also noted that appellant had authored two books.[3]

In a letter dated September 7, 2000, an official with the employing establishment related that appellant's former work requirements did not include lifting or carrying 10 pounds or repetitive use of a computer. The official stated, "While in the position of Chief Inspector, [appellant] had minimal use of handcuffing techniques, use of his gun and engaging in arrests where physical force was required."

The Office prepared an updated statement of accepted facts based on the information received by the employing establishment and, by letter dated July 11, 2001, requested that Dr. Vitek review an enclosed statement of accepted facts and respond to questions regarding appellant's diagnosis, the cause of his condition and extent of any disability. Dr. Vitek in a response dated August 21, 2001, informed the Office that he had previously answered all questions regarding appellant's disability and causation.

By letter dated November 28, 2001, the Office referred appellant to Dr. Joseph White, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated December 10, 2001, Dr. White discussed appellant's physical complaints and reviewed his January 12, 1998 electromyogram. He diagnosed work-related bilateral carpal tunnel syndrome. In a supplemental report dated December 11, 2001, Dr. White opined that appellant continued to have residuals of his carpal tunnel syndrome but found that he could "perform his previous job" and had "no physical limitations." Dr. White noted that appellant currently worked "at a job that is relatively demanding."

In a decision dated September 9, 2002, the Office determined that appellant was not entitled to compensation for a loss of wage-earning capacity because he was capable of performing his date-of-injury position.

By letter dated October 10, 2002, received by the Office on October 17, 2002 appellant requested a hearing on his claim. In a decision dated December 11, 2002, the Office denied appellant's request for a hearing as untimely.

[2] In a report dated April 4, 1997, Dr. Maurath opined that beginning 1990 appellant could perform light-duty employment with no lifting over 10 pounds and no frequent lifting or repetitive hand movements. She found that appellant was disabled from his usual employment.

[3] The official stated that the employing establishment would have provided appellant with a light-duty position if he did not have a felony conviction.

The Board finds that appellant has not established that he is entitled to compensation for an injury-related loss of wage-earning capacity.

A claimant seeking benefits under the Federal Employees Compensation Act[4] has the burden of proof to establish the essential elements of his claim by the weight of the evidence, including that he sustained an injury in the performance of duty and that any specific condition or disability for work, for which he claims compensation is causally related to that employment injury.[5]

The Office accepted that appellant sustained employment-related bilateral carpal tunnel syndrome. Appellant has the burden of proof to establish that the accepted employment injury caused disability for any period claimed. "Disability" means the incapacity, because of the employment injury, to earn the wages that the employee was receiving at the time of injury.[6] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to continuation of pay or monetary compensation for any loss of wage-earning capacity resulting from such incapacity.[7]

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a reasoned medical opinion that supports a causal connection between the claimed disability and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain medically how the claimed disability is related to the injury.[8]

In this case, the medical evidence is insufficient to establish that appellant has any employment-related disability. In a report dated December 9, 1999, Dr. Vitek opined that appellant's physical restrictions were the same as those found by his prior attending physician, that of no lifting over 10 pounds or performing repetitive hand movements. However, as the employing establishment specified that appellant's date-of-injury position did not require lifting over 10 pounds or repetitive work, Dr. Vitek's opinion is insufficient to establish that appellant remained totally disabled.

The Office prepared a statement of accepted facts based upon information obtained from the employing establishment regarding the physical requirements of appellant's date-of-injury position. The Office specifically requested that Dr. Vitek review the information and provide an updated medical report; however, the physician did not respond to the Office's request to provide a current medical report. The Office, therefore, properly referred appellant to Dr. White, a

[4] 5 U.S.C. §§ 8101-8193.

[5] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *Richard T. DeVito*, 39 ECAB 668 (1988).

[7] *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

[8] *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

Board-certified orthopedic surgeon, for a second opinion evaluation. In reports dated December 10 and 11, 2001, Dr. White diagnosed bilateral carpal tunnel syndrome and found that appellant could return to his usual employment with "no physical limitations." Dr. White's opinion, which is based on a complete and accurate factual and medical background, constitutes the weight of the evidence and establishes that appellant has no disability due to his accepted employment injury. The Office, therefore, properly determined that appellant was not entitled to compensation on the grounds that he sustained a loss of wage-earning capacity.

The Board further finds that the Office properly denied appellant's request for a hearing as untimely.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[9] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[10]

The Office in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,[11] when the request is made after the 30-day period established for requesting a hearing,[12] or when the request is for a second hearing on the same issue.[13] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[14]

In this case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated September 9, 2002 and, thus, appellant was not entitled to a hearing as a matter of right.[15] Appellant requested a hearing in a letter dated October 10, 2002. Hence, the Office was correct in stating in its December 11, 2002 decision,

[9] 5 U.S.C. § 8124(b)(1).

[10] *Frederick D. Richardson*, 45 ECAB 454 (1994).

[11] *Rudolph Bermann*, 26 ECAB 354 (1975).

[12] *Herbert C. Holley*, 33 ECAB 140 (1981).

[13] *Johnny S. Henderson*, 34 ECAB 216 (1982).

[14] *Sandra F. Powell*, 45 ECAB 877 (1994).

[15] The cover letter accompanying the Office's September 9, 2002 decision was not dated.

that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's September 9, 2002 decision.[16]

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its December 11, 2002 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by appellant requesting reconsideration and submitting additional evidence to establish that he had a loss of wage-earning capacity due to his employment injury. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken, which are contrary to both logic and probable deduction from established facts.[17] In this case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The decisions of the Office of Workers' Compensation Programs dated December 11 and September 9, 2002 are affirmed.

Dated, Washington, DC
June 20, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

[16] In his appeal to the Board, appellant submitted a copy of the Office's September 9, 2002 decision, which contains a cover letter dated September 12, 2002. The Board cannot consider new evidence on appeal; however, appellant can submit this new evidence to the Office and requested reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2); *see* 20 C.F.R. § 501.2(c).

[17] *Daniel J. Perea*, 42 ECAB 214 (1990).